

SENATE SELECT COMMITTEE ON CALIFORNIA'S ROLE IN THE WORLD TRADE ORGANIZATION

Senator Tom Hayden, Chair

Informational Hearing
August 23, 2000

State Capitol

SENATOR TOM HAYDEN: The Select Committee on California's Role in World Trade, and the WTO and NAFTA, will come to order. We have Senator Mountjoy and myself, a number of consultants joining us.

The purpose of these hearings at these awkward times during the last weeks of the session is simply to obtain testimony that will help with framing the issues as we continue, and to do so in a time that the representatives of administrative agencies and legislators are in Sacramento. After August 31st, we will continue with some hearings, but we hope by then to build a record of information that we can use, and you've received plenty of background material from myself, from my office. And I've talked also to the Attorney General and to Mr. Cooney about these issues. So I will be very, very brief in reiterating the problem that we're trying to address.

Under the World Trade agreements, there's implementing legislation -- and I'm paraphrasing -- but it says that with respect to these agreements -- NAFTA, WTO, and all the corollary agreements -- that the federal government,

U.S. Office of the Trade Representative, is the lead person and they shall consult with the states on a continuing and regular basis.

The specifics of what is consultation have not been spelled out. It's developing ad hoc as kind of a practice or non-practice, depending on the state, and the definition of the state has not entirely been spelled out. Is it exclusively the state point of contact, which we jokingly call "the Spock," which would be in the Administration; or does it include the Legislature? This is not an academic issue since what's usually at stake is something the Legislature has done.

What we have established so far, beginning with the meeting in January of this year with Mr. Hatamiya and his staff, and then with these hearings, is that there's been little contact, or formality, or process so far with California, even though we are, by rank -- we'd probably be the 8th or 9th largest entity in the WTO if we were a member.

For example, in testimony at a previous hearing, we learned that the California Trade Representative has not had a meeting with Charlene Barshefsky, the U.S. Trade Representative. Although there's been communication, there's never been a meeting.

We also learned that, despite a January discussion that lasted for quite some time, there's been no consultation, formal or informal, with the Legislature between the point person for the state and the Legislature. During that time any number of issues, ranging from the MTBE case to the Supreme

Court decision regarding Massachusetts' procurement and Burma, have been decided; but there's been no discussion with the Legislature.

We also had testimony from other agencies -- the Department of Industrial Relations, the Resources Agency; the Secretary was here, Mr. Smith from Industrial Relations was here -- and their testimony indicated that they'd not been in a discussion like this, that they had had no contact with the point of contact for the state, much less with the Legislature. So even within the Executive branch, the contact, the consultation, had not even included parties whose jurisdiction could be affected in the case of the environment or labor standards -- procurement standards.

There was one attorney from the EPA who indicated that she had had consultation with the state rep on the substance of the Methanex case. She had been in your shop--

MR. RICHARD FRANK: Deborah Barnes.

SENATOR HAYDEN: Correct. And moved to EPA.

So if I understand her testimony, there's been no consultation between EPA and the state point of contact, but there was some consultation with Deborah Barnes when she was at your agency.

The role of the Attorney General is a very interesting one to us, and I want you to begin by describing how your office sees your role. You represent not the Legislature. You represent the Executive branch. But as part of the Executive branch, the attorneys for the Executive branch, you might want to comment on what role, if any, has been the pattern and what role the Attorney

General might have in mind as this very slow moving process solidifies and issues come before us.

I've got a number of other questions, but why don't we start there. If you have any opening comments, we'd very much appreciate your sharing them with us.

MR. FRANK: Certainly. Thank you, Mr. Chairman, and we appreciate the opportunity to testify this afternoon. Senator Mountjoy.

By way of introduction, I'm Richard Frank, and I'm the Chief Assistant Attorney General of the Department of Justice's Public Rights Division. It is within that division that most, if not all, of the issues pertaining to the Attorney General's representational role of its client agencies and his independent function tend to fall.

With me today is Susan Durbin, a Deputy Attorney General, from our Environment Section, one of our most skilled and experienced attorneys, and our point person with respect to one matter, the Methanex-NAFTA claim, that I know the committee is particularly interested in, and we'll be glad to answer whatever questions we can regarding that claim and our role with respect to it.

I think it would be perhaps useful to spend a couple of minutes explaining some of the things the Attorney General has been doing in his independent role which I believe bear on the interests of this committee.

SENATOR HAYDEN: Why don't you clarify the independent role.

MR. FRANK: Yes, I'd be glad to.

Under the California Constitution, and state statute, and the common law, the judge-made law of the State of California, the Attorney General has a longstanding, well-recognized role to represent not only the Executive branch of state government, as important an institutional function as that is, but also in his independent capacity to represent the people of the state of California generally.

So for example, within the Public Rights Division, we have several sections that do not have clients within the Executive branch but function in that independent role exclusively. Our Antitrust Section, which ensures compliance with state and federal antitrust laws is one example; our Consumer Law Section, which investigates and, where appropriate, prosecutes consumer fraud, represents the people as a whole; and then some of our client agencies like the Environment Section which have some client responsibilities also and act and operate in an independent role. The Attorney General's institutional role with respect to Proposition 65 enforcement is a prominent example of that.

So it is a dual function which the Attorney General carries out and which, to a large measure, the Public Rights Division follows.

SENATOR HAYDEN: Just to clarify. It's also within your Attorney General's power to decline to represent the state in exceptional cases. Is there not a discretionary--?

MR. FRANK: Yes. The Attorney General has that opportunity and that authority, but I will tell you now, having worked for five different Attorneys

General from both political parties, that in my experience, that authority to decline representation is exercised very, very rarely.

SENATOR HAYDEN: But it has been during--

MR. FRANK: It has been, and I'm aware of at least one or two occasions in each of the five Attorney Generals' administration _____.

In the Attorney General's independent role, we have very recently come across three pieces of litigation that I think are of interest to the committee -- the Chairman has mentioned one of them -- where we have participated as a friend of the court, representing the people of the State of California.

The first is the recently decided U.S. Supreme Court case in *Crosby v. National Foreign Trade Council*, commonly known as the Burma decision. In that case, the State of California, acting through Attorney General Bill Lockyer, in conjunction with twenty-two other states, did file a friend-of-the-court brief with the U.S. Supreme Court in support of the Commonwealth of Massachusetts, defending against the claim that Massachusetts imposed limits on state contracting with certain businesses having operations in Myanmar.

SENATOR HAYDEN: Was that launched before Mr. Lockyer became Attorney General?

MR. FRANK: That brief, I believe, was filed in the -- no. The short answer is no. That was during this Attorney General's administration, and I believe it was in the winter of '99-2000. That is a case that was just argued and decided in the last term.

SENATOR HAYDEN: But the previous Attorney General had not been amicus.

MR. FRANK: Not in that case, no. Not in that case. We had been following that case when it was in the First Circuit Court of Appeal. We've been following it closely.

UNIDENTIFIED: [Inaudible]

MR. FRANK: Yes. That's the other point. On June 19th, the Supreme Court ruled unanimously in favor of the view that the Commonwealth of Massachusetts' power to impose those least-favored-nation provisions, as they're sometimes referred to, are preempted by federal law as an unlawful interference with the presidential and congressional powers to conduct foreign relations.

The second case is called *Gerling Global Reinsurance Corporation v. Kelso*. This is a preemption challenge brought by private insurance companies to the California Holocaust Victim Relief Act of 1999, of which Assemblymember Knox, I believe, was the author. That preemption challenge, claiming that that is a statute which gave a cause of action to the victims of the Holocaust to pursue their claims, the insurance industry or portions thereof have filed a preemption challenge in Federal District Court here in Sacramento. We, again, in the Attorney General's independent role, filed an amicus brief in support of the constitutionality of that state statute. Unfortunately, the unhappy news is the same: the Federal District Court ruled against our position and in favor of preemption. That case is now on appeal to the Ninth Circuit

Court of Appeals where, last month, we filed a similar friend-of-the-court brief on behalf of the Attorney General.

SENATOR HAYDEN: Where is the appeal?

MR. FRANK: It's in the U.S. Court of Appeals for the Ninth Circuit.

SENATOR HAYDEN: And that just involved the Knox bill?

MR. FRANK: Yes.

SENATOR HAYDEN: Not the Hayden measures?

It was confusing to me. They chose one and I'm not clear why, because that would apparently leave in play the others.

MR. FRANK: I think the other legislation you're talking about is the subject of the next piece of litigation, about which I'm to refer.

SENATOR HAYDEN: The bad news is coming. Yeah, I thought that it hadn't escaped the notice.

MR. FRANK: So that's the second case. Again, we lost in the District Court but we are pursuing our argument, defending the constitutionality of the statute against that preemption point.

SENATOR HAYDEN: And why is that a _____ BTO(?) related?

MR. FRANK: It is not, but it raises the larger issue--

SENATOR HAYDEN: What's the preemption issue?

MR. FRANK: The preemption issue, and the claim is the same as in the Burma case, that the State Legislature, through enactment of this provision, is unlawfully interfering with foreign relation issues that are properly within the purview of the federal government.

SENATOR HAYDEN: The third is--?

MR. FRANK: The third is titled "In re World War II Era Japanese Forced Labor Litigation." That's pending in the U.S. District Court for the Northern District in San Francisco. Actually, it was just argued before Judge Walker last week, and that is a case in which legislation which provided a cause of action to victims of Japanese and German company slave labor activities has been challenged, again on the same preemption grounds, on the same theory that it constitutes an unlawful and unconstitutional interference with the exercise of foreign relations by the federal government.

SENATOR HAYDEN: Where was it argued?

MR. FRANK: In the U.S. District Court for the Northern District, which is based in San Francisco. And I've brought with me for the committee copies of each of those briefs that you and your staff can examine, and if you have any questions about those, we'd be glad to follow up. If you'd like us to keep you informed of the progress of those cases, we'd be glad to do so.

SENATOR HAYDEN: Are you not involved in the Methanex case?

MR. FRANK: Yes. That's the next one I was going to -- well, we are and we are not. We are involved in a less formal role, which is, I'm sure, at the heart of this committee's concern.

Before I turn to Methanex though, just to close this portion of my comments, the Attorney General sees it as his constitutional role to aggressively defend the constitutionality of state laws against challenges of preemption and we have repeatedly done so, not only in this context but in the

Prop. 65 context where it comes up repeatedly, and we've been much more successful.

But with respect to this area of preemption, where it is argued that state activities unlawfully interfere with the power of the federal government to conduct foreign relations, we have had very difficult sailing. It has been a difficult sell. The federal courts, as exemplified most prominently by the Burma decision, have not been sympathetic to our position.

SENATOR HAYDEN: Let me ask you this. We've studied the Burma decision, and not to go off into the realm of the arcane, a major component of the Burma decision was that if the federal government has acted, then and only then are they ruling that it would be a preemption of the state acting. In other words, if the state divested from Burma or South Africa and the federal government had not acted, the state law would not be struck under that court decision. It would be struck if the federal government preempted the field by acting.

Which is an interesting argument, if I understand it, because it's not saying that the state has no role in foreign policy. It's saying the state has a role in, quote, "foreign policy," unquote, if the federal government hasn't acted.

Is that not correct?

MR. FRANK: Well, that is one ground upon which the U.S. Supreme Court predicated its holding in the Burma case, but I believe -- and I just briefly reread it in preparation for our presentation this afternoon -- the Supreme Court went on, unfortunately, in my view, to also base its ruling on the more

general view that the Massachusetts state law stood as an obstacle to the effective carrying out of foreign affairs by the federal government. And that is far -- and its potential application in adverse effects on state law is much broader and more dangerous.

SENATOR HAYDEN: Well, that's something we've got to nail down because the attorneys we've talked to, who could obviously be wrong, very carefully read(?) it and thought that it was narrowly drawn. It didn't preempt unless the federal government had failed to act. But we'll try to get clarification.

MR. FRANK: Well, and I want to choose my words very carefully, Senator, because it's very important in the subsequent cases, the Japanese Forced Labor case, for example; we are arguing for a very narrow interpretation of the Supreme Court decision. So I certainly would not take strong issue with that characterization. I hope the narrow construction of the Burma case is the interpretation that is furthered by the lower courts in the months and years to come, but there is some doubt about that.

Again, in this last brief that I will leave with the committee, we worked quite hard to kind of distinguish the Burma case and limit it to its facts. So I think we're on the same wavelength.

SENATOR HAYDEN: And you understand in these cases we've argued that we're not meddling in foreign policy, although I wish the U.S. government had solved these problems; they've had fifty years. We're trying to represent residents and constituents who reside in California, trying to deal with what's

appropriate procurement law: whether or not people can have...[inaudible]...for grievances that have languished since...[inaudible] ...'30s, that have not been resolved by the federal government.

MR. FRANK: And that is very consistent with the arguments we've made in each of these three cases.

Turning from the litigation--

SENATOR HAYDEN: I'll give you the interpretation by Mr. Stumberg.

MR. FRANK: Please.

SENATOR HAYDEN: Were you going to go into what implications the Burma case could have for other California laws?

MR. FRANK: Well, I can do that briefly. We have not gone through an exhaustive search. We did so briefly immediately after the decision was issued in June, and our quick survey, not generated by any client request or by the Legislature but just a quick internal review, suggested that the scope, at least with respect to state laws, was not that great. A different answer perhaps with respect to local ordinances adopted; for example, by the City of Los Angeles and some of the local jurisdictions. But our quick analysis is that it should not have any major direct effect on ongoing statutes at the state level.

SENATOR HAYDEN: Just on that. Now, if Massachusetts can't pass this particular procurement law but the City of Los Angeles has, how do the proponents of the decision get the L.A. law struck down? What's the mechanics? Where do they go? And if I want to defend the L.A. law on the contrary, where do I go?

MR. FRANK: Well, I wouldn't presume to sit in Jim Hahn's shoes, but my guess is, he would mount an equally vigorous defense of that measure. And I'm not familiar with the details of the Los Angeles ordinance except--

SENATOR HAYDEN: But just because the case was settled regarding Massachusetts, does it require another legal challenge to the Los Angeles ordinance?

MR. FRANK: Yes. It wouldn't automatically invalidate the Los Angeles ordinance. It would require another legal proceeding or, short of that, if the City of Los Angeles were to unilaterally agree with opponents of that measure, I suppose they could work out something by stipulation.

But the short answer to your question is it would require independent--

SENATOR HAYDEN: All right. And do you know how many California cities -- what part of the population?

MR. FRANK: I don't have a comprehensive--

SENATOR HAYDEN: Is it four or five cities?

MR. FRANK: I believe so. I think it's L.A. and several in the San Francisco Bay Area. I could try and pull that material for you.

SENATOR HAYDEN: I think it's L.A., Oakland, Berkeley, Alameda County.

MR. FRANK: That sounds consistent with my recollection.

Let me then turn, or let us turn to the Methanex claim, which is the first application of NAFTA, in which, to my knowledge, our office has been involved. And as I mentioned, I have been somewhat involved in that; Ms. Durbin to a far greater degree than me. You've heard in the form of prior testimony a lot of--

SENATOR HAYDEN: Wait, go back.

MR. FRANK: Yes.

SENATOR HAYDEN: As a matter of fact, regarding state legislation -- you might know or do a more careful check -- I have a bill. There may be other bills but I have a bill that follows the federal procurement ban on contracts with firms that exploit child labor, child prostitution, etc. That bill is on the Assembly Floor. Part of the reason we put it out is that the federal government took the lead. We thought it would be a nice idea for California, with our procurement power, to follow up.

Is that another target bill because the federal government has preempted the area? I would ask you to watch or take a look at that bill and give us a heads up if we're walking into a challenge.

MR. FRANK: I'm sure Ms. Redway has the bill number, but if your staff could provide it to me, that would be helpful.

SENATOR HAYDEN: Go ahead.

MR. FRANK: The Methanex claim, as you know -- [interruption] -- we are certainly aware of the Methanex claim that has been made under NAFTA. That follows Attorney General Lockyer's first action actually when he was inaugurated. The day after, in fact, was to intervene in pending litigation at Lake Tahoe over challenging, again in part on preemption grounds, the TRPA imposed ban on two-stroke engines at Lake Tahoe, and that in turn was predicated on the view that they were jettisoning a great deal of their unburned fuel into Lake Tahoe, replete with MTBE contaminants. We were successful in

that intervention, and the Attorney General's intervention in the case was followed shortly thereafter with a favorable settlement. That was part of the growing concern, public concern, over MTBE. I believe shortly thereafter Governor Davis adopted his Executive Order with respect to MTBE, and it was that action, I believe, which to some degree, at some point soon thereafter, prompted the claim by Methanex, the Canadian corporation, against the federal government under NAFTA.

SENATOR HAYDEN: What were the bills? There was...[inaudible]...California filed against the Executive Order...[inaudible].

MR. FRANK: Actually, it's not a claim against the State of California. Under NAFTA, the claim can only be brought and was brought exclusively against the federal government, although--

SENATOR HAYDEN: For allowing California to be involved.

MR. FRANK: Yes, for having allowed California to exercise its police power.

We have been following that. We have been coordinating with the Trade and Commerce Agency, with the Governor's Office, and with Cal-EPA, and ensuring that the state speaks with one voice in an effort to influence that process and work with the federal government to see that the most vigorous and persuasive case can be made against a claim by Methanex, which we believe at the state level is utterly without merit.

And as I say, Deputy Attorney General Durbin has been our point person in that regard in working closely with all those state agencies, and has had

contact, as I have, less frequently than she, with some of the federal officials who, on at least one occasion, have traveled here to California to consult with us specifically with respect to the Methanex claim.

SENATOR HAYDEN: Your bill was what, Richard? Five twenty-one?

SENATOR RICHARD MOUNTJOY: Yeah, 521.

SENATOR HAYDEN: Five twenty-one is featured in the brief on page 17.

SENATOR MOUNTJOY: On Methanex, the suit was for some 900 million?

MR. FRANK: I believe that's right.

MS. SUSAN DURBIN: Nine hundred and seventy million was their initial claim.

SENATOR MOUNTJOY: But yet, Methanex, in the last quarter, reported profits were up.

MS. DURBIN: In fact, their stock has never particularly lost value. They have indeed reported gains. It has no apparent effect on their shareholders.

MR. FRANK: And as the committee undoubtedly knows, while the Methanex claim was predicated by California state action, that in turn was followed shortly thereafter, I believe, by USEPA Administrator Browner announcing that the federal government is following California's lead, at least initiating steps to address the Methanex problem, and from our perspective hopefully to ban it on a nationwide basis.

MS. ANNE BLACKSHAW: [Inaudible]...quoting that they were going to do a similar preemptive legislation but that, in fact, they have decided against that.

MR. FRANK: I think they have decided against a blanket ban.

My understanding, and it may be less current than yours, is that USEPA is very concerned about MTBE and is dealing with it in one fashion or another. Perhaps not as comprehensively as it once thought it might and certainly not as sweepingly as Governor Davis has attempted to do through his Executive Order.

MS. BLACKSHAW: Would then have the same effect of preempting of the Burma case, of preempting any state action.

MR. FRANK: Not necessarily.

MS. DURBIN: No, that's not exactly correct.

SENATOR HAYDEN: [Inaudible]...to your testimony?

MS. DURBIN: I don't have prepared remarks. Perhaps I could address that initial question.

California has independent authority under the federal Clean Air Act to set not only automotive standards but fuel standards, as long as we obtain a waiver from the federal standards, under extremely liberal standards that are set by the Clean Air Act.

So we would be able to go ahead and take independent action even if the federal government did not. We already have California reformulated gasoline, which is an extremely complex set of regulations and requirements -- which the Air Resources Board representatives here can address better than we can -- which will deal with the oxygenate question.

The EPA is trying to revisit the oxygenate question, but regardless of what they do, we should be able to take independent action. We certainly can present adequate justifications under the Clean Air Act to do that.

SENATOR HAYDEN: All right. Do you want some questions, or do you have some remarks on Methanex?

MS. DURBIN: Well, I'd just like to start out by saying that the federal government has been extremely cooperative in this case. They contacted us within a week of the claim first being filed under NAFTA.

SENATOR HAYDEN: Who contacted you?

MS. DURBIN: The Office of the Trade Representative. That's required under federal legislation in their state consultation process. They contacted several different state agencies and organized a conference call immediately in which Cal-EPA participated, California Trade and Commerce Agency participated, we participated, several other agencies participated, to brief us on what the claim was and make sure that we were acquainted with it immediately. At all stages of it they have been extremely forthcoming with information.

SENATOR HAYDEN: Was the Legislature ever consulted, to your knowledge, since it was...[inaudible]?

MS. DURBIN: Well, since it was the legal defense of a specific claim, it was in the nature of a case analogous of a court action. They contacted the Attorney General's Office as lawyer-to-lawyer contact and contacted some of the agencies that had regulations that dealt with the specific subject matter. I'm not aware that they contacted the Legislature.

SENATOR HAYDEN: But the USTR is not a...[inaudible]...state point...[inaudible] ...that created the conversation between state agencies. Just

for the record, unless you know otherwise, assuming there was no contact with...[inaudible].

MS. DURBIN: I do not know that. It's certainly possible. I haven't asked anyone.

SENATOR HAYDEN: Did you ever, in all your discussions about this whole issue, did the issue of contacting...[inaudible]?

MS. DURBIN: I do not recall that it did.

SENATOR HAYDEN: How many conversations did you have with the...[inaudible] ...state or federal?

MS. DURBIN: Dozens. Many.

SENATOR HAYDEN: Dozens. Over how many weeks and months?

MS. DURBIN: Starting June of last year and continuing until this last week.

SENATOR HAYDEN: So for the last fourteen months, you can't recall a single conversation over a fourteen-month period that included a comment about, *We ought to consult the Legislature*.

MS. DURBIN: I cannot recall that. That doesn't mean it didn't happen.

SENATOR HAYDEN: Right. But you have no recall.

MS. DURBIN: No, sir.

SENATOR HAYDEN: Okay, thanks.

MS. DURBIN: The U.S. Trade Representative's Office passed the claim as their structure(?) to the State Department's Office of Legal Counsel, who are the actual attorneys that defend the claim before the arbitration panel. And we have met with the actual trial attorneys who've prepared the brief. We've seen

drafts of the papers. We were involved in picking the United States' choice of arbitrator. They have provided us with information and opportunities to comment and provide information to them at all points.

In addition, I'm sure you know, Methanex also filed a request before the Commission on Environmental Cooperation, that was set up under the side agreements in NAFTA, and asked them to investigate the enforcement by the federal government and by the California government with their enforcement of the underground tank regulations that are supposed to keep the gasoline from leaking.

We've also been consulted with -- the Executive Director of the Secretariat of the CEC came out and met with our office and with a number of other state agencies to make sure we were informed about that claim, and they have in fact issued a decision that they are not going to investigate. They're not going to take up that request to investigate the Commission on Environmental Cooperation, which is a body set up under the side agreement to NAFTA to make sure that the signatory states enforce their environmental regulations and don't degrade them in order to attract companies.

SENATOR HAYDEN: You might not know this, but...[inaudible]...know if any of those people ever consulted Senator Sher...[inaudible]?

MS. DURBIN: No, sir; I have not had as close contact with them as I have with the trial attorneys.

SENATOR HAYDEN: Did you ever hear of any involvement by any legislator or legislative staff in all of the discussions about the underground tank issue?

MS. DURBIN: Certainly the CEC staff were aware of Mr. Sher and they may have contacted him independently. His name was mentioned.

SENATOR HAYDEN: So we can check with Mr. Sher about what he heard from them? Do you remember the name of the staff person?

MS. DURBIN: No, I'm sorry I don't. I could find it in my notes.

SENATOR MOUNTJOY: Could I ask a question?

SENATOR HAYDEN: Senator Mountjoy.

SENATOR MOUNTJOY: This is all in a NAFTA court, right? I mean, the lawsuit Methanex has filed in a NAFTA court?

MS. DURBIN: It's not a court per se.

SENATOR MOUNTJOY: Yeah, it's like an arbitration type of--

MS. DURBIN: Yes, it's a panel, it's an arbitration panel.

SENATOR MOUNTJOY: Well then, does our amicus brief have any standing in that court?

MS. DURBIN: We have not presented--

SENATOR MOUNTJOY: Or whatever. I mean, you filed an amicus, right?

MS. DURBIN: No, sir. We do not have standing--

SENATOR MOUNTJOY: In the NAFTA court. So that's an independent court. So we're sort of cut out of the process.

MS. DURBIN: We are formally cut out; we have been extensively involved in providing information. And as I say, we've seen drafts of the pleadings that the State Department is presenting, and they've been very responsive to our comments on those drafts.

SENATOR MOUNTJOY: Yeah, but there's no legal standing for you. It's simply a comment standing, so therefore, all of our Prop. 65 stuff would be basically in jeopardy. I mean, we're unable, as a California entity, to legally have any legal standing in that NAFTA.

SENATOR HAYDEN: That's correct.

MS. DURBIN: That's correct, sir.

SENATOR HAYDEN: And is the NAFTA panel?

MS. DURBIN: It is open to the parties to NAFTA. It is not open beyond that. We are seeking permission for some representatives from Cal-EPA to attend the arbitration. We haven't heard back.

SENATOR HAYDEN: Is there a transcript of the panel's discussions?

MS. DURBIN: Not at this time. I don't think one will be released. It would require the consent of the parties to release it.

SENATOR HAYDEN: Would it be an exaggeration to say that these panels are secret?

MS. DURBIN: No, sir, I would not say that's an exaggeration.

SENATOR HAYDEN: So if a Sher bill or a Mountjoy bill, or Prop. 65, which was passed by whatever it was -- 60, 70 percent of the voters -- got

challenged under NAFTA, it would go to a tribunal that would be secret except for the participation of the parties. And the parties would be--

MS. DURBIN: Well, that depends, Senator. In the Methanex case--

SENATOR HAYDEN: Right. I'm asking for just--

MS. DURBIN: In the Methanex case, a private company has filed a claim against the United States.

It's important to recognize that California is not a party who can participate. We're also not a party against whom any judgments could be rendered. This dispute is only between--

SENATOR HAYDEN: Well, that's not quite true, but let's get to that in a moment what will happen to us.

The panel, as I understand it, just to cut to the chase, is somebody makes a challenge -- a business, whoever, makes a challenge -- and the Canadian and the American governments take it up; and each appoints a panel member from the two countries; and then the two governments appoint a third panel member who is mutually acceptable. The representative of the United States is, in effect, the person that California would have to turn to, but they have a conflict because they're representing the federal government and the state government. The state government is not represented.

Is that correct?

MS. DURBIN: Could I start at the beginning of that, Senator?

SENATOR HAYDEN: Sure.

MS. DURBIN: First, the government of Canada has no role in this particular case. This was filed by a private company against the United States, and the government of Canada declined to take up--

SENATOR HAYDEN: I was asking how NAFTA tribunal panels are empowered, but in this case, go ahead if it was done differently.

MS. DURBIN: And again, the government of Canada has had no role in this. They did not pick an arbitrator. The company Methanex did. The government of Canada declined to take up Methanex's challenge and make it their own.

SENATOR HAYDEN: Methanex has a party.

MS. DURBIN: Methanex is a party and the United States is a party.

SENATOR HAYDEN: So it's a Canadian based corporation and the United States government. They each have a representative to this panel?

MS. DURBIN: That's correct, sir.

SENATOR HAYDEN: And is there a third representative?

MS. DURBIN: Yes. A third representative has been chosen.

SENATOR HAYDEN: A third representative is chosen by the first two. Is that correct?

MS. DURBIN: That's correct.

SENATOR HAYDEN: All right. So let's get this real clear. If California law is passed phasing out MTBE, a Canadian company doesn't like it because they think it threatens their profit stream from a component of MTBE, they sue not California, they sue the federal government under NAFTA.

MR. FRANK: They file a claim under NAFTA.

SENATOR HAYDEN: File a claim. Sorry. They file a claim, and the claim's panel is the company, the U.S. government, and a third person chosen by the two. Even though it's about California.

MS. DURBIN: That's correct.

SENATOR MOUNTJOY: So they become a third of the judge -- a third of the decision making.

SENATOR HAYDEN: Well, no. They have a veto over the majority, because if I understand this, they're there, here's Methanex, here's the U.S. government. In choosing a third, Methanex has to...[inaudible]. Correct? It is correct. So they then dominate the panel.

SENATOR RAY HAYNES: Well, in most arbitrations, in most settings, are where one party picks an arbitrator, another party picks an arbitrator, and then the two arbitrators get together and pick the third. In most arbitrations that's how that goes.

SENATOR HAYDEN: That's right.

SENATOR HAYNES: Or both parties to the arbitration agree on who the arbitrator is going to be.

SENATOR HAYDEN: But what's bizarre in this case, just in my own personal view as a legislator, is it's all about laws passed by the Legislature of the State of California, but neither the Legislature nor the Executive branch is party to this mechanism.

SENATOR HAYNES: Correct.

SENATOR HAYDEN: And it's secret! There's no transcript. We have a transcript. There's no such transcript.

SENATOR HAYNES: And assuming the U.S. loses, I'm sure at some point in time the U.S. will come back to the California Legislature and either say, *Change your rules or Pay us the money.*

SENATOR HAYDEN: Well, that's what I'm asking. I believe that is exactly the path if we lose. I know that there's a rosy view that we're going to win, but someday we're going to lose in a case like this theoretically. What then happens? Let's see if we're on the same page.

If a company -- let's not say Methanex -- a company is claiming a \$900 million loss from a California law, they file a claim that their own government, the Canadian government, doesn't back, and they therefore have one seat on a three-person panel and a second seat that they have veto power over, the panel upholds the company against California--

SENATOR MOUNTJOY: Against the United States.

SENATOR HAYDEN: Against the United States over the California law. Then what happens? Is Mr. Haynes on the right path there? Is that what happens? I think it is. It's not clear, and you're our representative here. We need to know.

MS. DURBIN: Well, it depends on what the federal government wants to do.

SENATOR HAYDEN: It depends on what the federal government -- is this not written down somewhere?

MS. DURBIN: Yes. There's a statute that says that the federal government can then file an action to invalidate the California law if it wants to.

SENATOR HAYDEN: And they file that action with whom?

MR. FRANK: They would file that in federal court. At that point it becomes a conventional lawsuit of the type I mentioned at the beginning of my testimony.

SENATOR HAYDEN: Then California could be represented.

MR. FRANK: That's right.

SENATOR HAYDEN: And what's the other option?

MS. DURBIN: The federal government could decide to pay Methanex, simply compensate them.

SENATOR HAYDEN: The federal government could ask California to compensate Methanex?

MS. DURBIN: No, the federal government could itself compensate Methanex, could simply pay the claim.

SENATOR MOUNTJOY: And then get the money from us later.

SENATOR HAYDEN: Well, the federal government would be unlikely to pay for the California law, but this involves eight or nine states.

MR. FRANK: Well, actually, as I understand NAFTA, if there's a monetary penalty imposed, the federal government has no choice but to pay it. Then the question is, would the U.S. government turn around and try to seek indemnification from the State of California?

SENATOR HAYDEN: And if they did that, what form would that be in?

MR. FRANK: That presumably would take the form, absent of voluntarily relinquishing by California the money, which I consider highly unlikely, it would find its way into court, either state or federal court.

SENATOR HAYDEN: What are the other options? Or is that it?

MR. FRANK: Well, I think the key point I want to come back to is under the federal legislation implementing NAFTA, the only means by which a California statute -- and your hypothetical -- could be invalidated is if the federal government, and only the federal government has this authority, goes into court, files an action against the State of California, seeking to invalidate the California law. We would then, in our representational role, be defending the constitutionality of that statute, and we would do so vigorously. But it would be subject to--

SENATOR HAYNES: The other side of it is the federal government -- another remedy the federal government could seek beyond the constitutionality though is to pass another law that basically preempts the California law, and then challenge California law on the basis of the preemption.

MR. FRANK: The federal government, or the Constitution and the Supremacy Clause always has the power to pass a congressional statute which eclipses California's right to regulate in any particular area.

SENATOR HAYNES: Right. And the other thing that the federal government could do, if they paid the monetary award, is, through the budgetary process, say, *We're going to give you \$120 billion and we're*

subtracting that monetary award out of that, also through federal legislation and the budget process.

Is that a fair assessment?

SENATOR HAYDEN: I believe they could just deduct it from--

SENATOR HAYNES: Yeah, take it out of our transportation funds or our welfare funds or some other thing.

MR. FRANK: Senator, I'm not prepared to concede here today that that would be a lawful act, that we would have a right to challenge that.

SENATOR HAYNES: But I mean, if it's a federal reimbursement, part of a federal law, they would -- I mean, we do it all the time. If we have problems with what local governments do, we just take their money.

MR. FRANK: But just as there is a process by which local governments can and do challenge some of those funding decisions through the Commission on State Mandates, and what have you, there is a process by which California, I think, at least has a remedy to challenge that kind of action.

SENATOR HAYNES: To challenge, but in the meantime we've lost the money. I mean, if the federal government did it through the budgetary process, passed a statute saying it was appropriate for the federal government to do it through the process -- I mean, the Commission on State Mandates is a constitutional thing under the California Constitution. No such thing exists in the federal Constitution.

Is that a fair statement?

MR. FRANK: Not in the federal Constitution. There's a federal statute where monetary claims against the federal government can be advanced in a special court system, but this is the other way around.

SENATOR HAYNES: But I'm just saying, though, a federal statute can always be overridden by a subsequent federal statute. If Congress determined they wanted to do that, we would have no constitutional protection in front of the Court of Claims.

MR. FRANK: That is correct.

SENATOR MOUNTJOY: Is the NAFTA panel, or NAFTA arbitrators, are they like any other arbitration where they don't necessarily have to follow any law? I mean, generally arbitrators arbitrate the thing and it doesn't matter what the law is; they can sort of do their own thing.

Is that the same with NAFTA, that they can just -- though we can prove that they didn't have any stock reduction, we can prove that their profits were up in the last quarter, proving that they basically were not injured, but that in the NAFTA setting with the arbitrators wouldn't necessarily mean anything if they decided to award the 900 million to Methanex.

MS. DURBIN: Well, under NAFTA, part of the agreement that is NAFTA is that the standard concepts of international law and of the laws of the parties, as to such things as takings, are to be applied. And this is as clear a case of not taking that I have ever seen in my 22 years as a lawyer. There is no way they can possibly win this case.

SENATOR MOUNTJOY: What kind of an appeal is there if the decision -- is there an appeal to the NAFTA decision?

MS. DURBIN: No, sir.

SENATOR MOUNTJOY: There is no appeal.

MS. DURBIN: There is not an appeal function under NAFTA. There is under the WTO but not under NAFTA.

MR. FRANK: The other part of this that is troubling to us, as I'm sure it is to you, is that we are at the front end of this process. These are among the very first of these claims being made, monetary claims made under NAFTA, and in our conversations, at least those to which I've been privy, the federal officials have been quite candid in the view that they're developing the protocol and the expertise. So I think we have some ability, hopefully, to influence how public this is, how open a process this is, and I would hope we could play as constructive a role as we could, understanding again it's purely advisory.

SENATOR HAYDEN: Is there a challenge to...[inaudible]?

MR. FRANK: Not under NAFTA. There have been repeated challenges in court, claiming various types. But ever since that measure was enacted by the voters in 1986, a regular claim or theory is that Prop. 65 is preempted by this or that federal law. We have defended those preemption claims vigorously and have been very successful in doing so.

SENATOR HAYDEN: But under NAFTA or WTO, there haven't been any challenges.

MR. FRANK: Not to my knowledge.

SENATOR HAYDEN: Do you expect any?

MR. FRANK: It's hard to say since we don't have any operating record as to how expensive this process is, how cumbersome, how time-consuming it is. It's certainly a possibility.

SENATOR HAYDEN: If the federal government ever got into a hypothetical showdown with California over...[inaudible]...or strike some law that California had passed, that would be in court?

MR. FRANK: Yes. Senator Haynes is right. I guess this could come up in the context of a "strings attached" federal appropriation hypothetically, but the normal means by which--

SENATOR HAYDEN: In a political give and take?

MR. FRANK: Yes. The formal and most probable answer is that would be litigated in the context of the Supremacy Clause and a preemption challenge in a court of law.

SENATOR HAYDEN: We're backing into something that is potentially very dangerous to any...[inaudible]...where one could say that the problem is sneaking up on us and it's going to have us before we respond.

I had just one other process question for the Attorney General. On that Burma case or other cases, did you have communication with the Trade and Commerce Agency? On the Burma case?

MR. FRANK: I don't believe so. Not to my knowledge, Senator. I can double check, and perhaps I should, so I can't say categorically.

SENATOR HAYDEN: So can we assume that the Trade and Commerce Agency was part of California's case on the side of Massachusetts?

MR. FRANK: No, I don't think that would necessarily be a correct assumption. This is a brief, an amicus effort, that was coordinated through the National Association of Attorneys General.

SENATOR HAYDEN: So it was decided as part of the State of California Attorney General's independent role?

MR. FRANK: Yes, and coordinating with its sister states.

SENATOR HAYDEN: Did the California Attorney General's Office seek to communicate and coordinate with the Administration, with the point person Mr. Hatamiya?

MR. FRANK: I believe we generally do. I can't state categorically if we did in this case.

SENATOR HAYDEN: Would it have been in the nature of just a notification to him or a sit-down, face to face?

MR. FRANK: It would depend on the case.

SENATOR HAYDEN: In this case. In the Burma case.

MR. FRANK: In this case, it could be a sit-down meeting, it could be a telephone call.

SENATOR HAYDEN: But you don't know if anything happened.

MR. FRANK: I don't know. I'd be happy to check into that.

SENATOR HAYDEN: Thank you.

And would the Governor have been brought in? Would the Attorney General ordinarily in this kind of situation notify the Governor or meet with the Governor about California's--?

MR. FRANK: Not necessarily. We, in fact, collaborate and talk to the Governor's Office on almost a daily basis on a variety of issues, so I would not be at all surprised if we did consult.

SENATOR HAYDEN: Then what I'd like you to get back to us in writing or in communication is whether or not there was communication between the Attorney General's Office on the Burma case and the Trade and Commerce rep, who's the state point person in the trade consultations with the federal government, or whether there was discussion with the Governor's Office on some other level. Because part of what we're trying to sort out is who needs to consult with who, is there a formal process, or do we have a lot of agencies and players being activated by a phone call but otherwise not being activated? And it appears that where something heats up, like the Methanex case, those in a small loop of expert lawyers, for example, do contact each other and there's a lot of communication.

But I wonder if you feel there has been more formalized, institutionalized communication or needs to be.

MR. FRANK: From our perspective, that would certainly be welcome. Being lawyers and litigators, we tend to move from case to case and filing deadline to filing deadline, but perhaps on a more constructive and programmatic way we can work with and consult with our client agencies,

particularly those like Trade and Commerce who have expertise in an ongoing institutional role.

SENATOR HAYDEN: I'll give you an example of why coordination might be useful. Michelle, you've recalled for me, our two U.S. Senators were split on the Burma case, so they'd be back in Washington. They were amicus. Senator Boxer was with the Attorney Generals and Senator Feinstein was with President Clinton and the business community. So California had two U.S. Senators on opposite sides of a case affecting a California law, and I bet there wasn't much communication between those Senators or the California Trade Representative or the California Attorney General.

But ordinarily, I would think if you're trying to protect a state prerogative, you would want some communication so that you don't have your federal delegation. And it was true of the congressional delegation. I remember there were ten on one side and ten on the other. That's not helpful when you're trying to unify a state response. And I don't know that communication could solve it, but it's another example of fragmentation in the face of a unified challenge.

MR. FRANK: Understood, Mr. Chairman. I couldn't agree more. It's nice to have the state speak with one voice whenever possible.

SENATOR MOUNTJOY: Is there a possibility on the Methanex case that the State of California could sue Methanex Corporation for the pollution of our water and the cleanup?

MR. FRANK: It's certainly possible.

SENATOR MOUNTJOY: I mean, we would be then in the case with Methanex to -- if they want to admit to putting all of the ethanol or the methanol in our water supply, it seems to me like we could file a suit against Methanex where we then would be one of the parties to sue for the cost of the cleanup of our water pollution here in California.

MR. FRANK: We have in the past gone after and filed -- investigated and where appropriate filed suit against various of the petroleum companies who use MTBE as a constituent in their gasoline, when through storage and underground storage tanks you have leakage and migration into water supplies, going after the manufacturer of that component. That's a somewhat attenuated scenario. It might increase the legal challenge from our perspective.

SENATOR MOUNTJOY: But under NAFTA we have no law. We're not following rule of law here; we're following arbitration basically. And it seems to me that they are admitting to be the folks that have created the chemical. It seems to me like they should be responsible for the cleanup of the water, and I don't see why we wouldn't file a suit under NAFTA to recoup the cost of the cleanup of the state of California.

SENATOR HAYDEN: Maybe you can get back to the Senator on that with an opinion.

MR. FRANK: We can and will do that. A threshold problem, I believe, and what I was consulting with Ms. Durbin, I don't believe the State of California has standing to bring a claim under NAFTA against a foreign corporation. Again, we would have to work through the good offices of the federal government.

SENATOR MOUNTJOY: If a private corporation can file, you mean a state can't?

MS. DURBIN: We would be filing against Canada, Senator, rather than directly against Methanex if we went under NAFTA. It would be much more direct to go against Methanex in other legal contexts outside of NAFTA.

SENATOR HAYDEN: You're saying that, aren't you? You're asking is there another--

SENATOR MOUNTJOY: Another way to do that.

SENATOR HAYDEN: All right. Well, you'll get back to us.

MR. FRANK: Yes.

SENATOR HAYDEN: One other thing on the Mexico trucking issue. Mexico is challenging us under NAFTA.

MS. DURBIN: Yes, sir.

SENATOR HAYDEN: Has the Attorney General's Office been involved in defending California there?

MS. DURBIN: We have not been involved. We've been advised of the penancy of the action and provided with the briefs. We haven't had a chance to read them yet.

SENATOR HAYDEN: Advised by whom?

MS. DURBIN: By the Office of the Legal Advisor of the State Department. The same people who are working with us on the Methanex case.

SENATOR HAYDEN: Why are you more involved in Methanex than the Mexican trucking case?

MS. DURBIN: I believe that that one came up before we were involved with Methanex. I'm not sure who they contacted when they initially contacted the state, but I wasn't involved at that time.

SENATOR HAYDEN: It would be 1998, and that would be before the current Attorney General.

MS. DURBIN: Yes, sir.

SENATOR HAYDEN: But since the new Attorney General has come in, you've not activated a unit to look at the state's interest in the Mexican truckers case?

I say this with great interest because our expert sources, who could be wrong, say the decision is expected this year -- by the end of this year. It's now August.

MS. DURBIN: Yes. By the time I became aware of the case, it was fairly well advanced. I don't know what has been done in advance. I could find out and we can advise you.

SENATOR HAYDEN: Is nobody defending California in the case? Is it the U.S. government?

MR. FRANK: The claim presumably is against, like in the Methanex claim, would be brought against the federal government. And to the best of my knowledge, at least during the current Administration, neither the federal government nor any client agency of ours in the State of California have asked us to take an active role. That doesn't preclude us from injecting ourselves into that issue, but we have not been invited to do so.

SENATOR HAYDEN: Do you understand the problem I'm having?

MR. FRANK: Very well, Senator.

SENATOR HAYDEN: What would you say is the problem I'm having?

MR. FRANK: Well, I don't want to be presumptuous, but I sense your frustration, Mr. Chairman, with the fact that the State of California has a lot of important programs and many issues affecting public health, safety, and welfare, but there is under NAFTA and related statutes not a formal role for the State of California to articulate, vindicate, and defend its interests under those treaties and the legal processes that have been set into motion by those treaties.

SENATOR HAYDEN: Well, that's in a general nutshell, but there's no role for the Legislature, even though periodically we've got a half dozen bills about Mexico-California trucking disputes. And more specifically, it seems kind of ad hoc whether or not a unit of the state gets involved in a challenge. For whatever reason, maybe the price tag -- a billion dollar suit on MTBE -- but why is there a complete unevenness between some activity on the Methanex case, and I don't know if it's inertness or little activity on the Mexican trucking case where both are challenges to California law?

Is it political? Is it bureaucratic that Ms. Durbin wasn't put on this when she came over? The previous Attorney General didn't jump into it? Shouldn't there be some way to tighten this up so that when we're challenged, some system is activated that responds and lets us know that this is happening to us?

MR. FRANK: Let me offer one suggestion, when you have a court challenge, when private party A sues private party B in court, claiming that a state statute is unconstitutional, is invalid. In both the federal courts and state courts there is a process. This Legislature enacted legislation about three years ago requiring the litigants and/or the court to formally notify the Attorney General of the State of California that in that private litigation to which the State of California is not a party or not yet a party, that the constitutionality, the validity of the state law, is being challenged. The intent is to inform the Attorney General's Office on behalf of the State of California and to allow him or her the opportunity to intervene or otherwise express the state's views on that issue of public importance.

It may be that we need a similar process under these trade agreements and implementing legislation, and to the extent those processes are already in place, and I'm not sure that they are, perhaps we need to make sure that they're fully enforced and complied with.

So at a minimum, I think we need to know promptly when these claims that potentially affect the validity of state laws are being challenged, be it in the context of a claim under NAFTA or in a federal court Supremacy Clause challenge.

SENATOR HAYDEN: And so does the Legislature.

MR. FRANK: Understood.

SENATOR HAYDEN: Well, I appreciate your candor, and I don't know if there are other questions, but I'd appreciate your getting back to us after

you've talked to the Attorney General about what needs to be done to tighten the process up, make it more accountable, draw the Legislature in, communicate between the Attorney General and other state agencies more effectively, before we really are ground up in these mechanisms that we're just barely beginning to understand and are so alien to our normal due process right of appeal, transparency, etc. It's almost like we've traded a new judicial system to challenge our laws. And if we lose in the new one I guess there's a resort to the old one, but how this happened to us is quite puzzling and we need to find remedial action, I think.

Any other questions?

If not, all right, thank you.

MR. FRANK: Thank you, Mr. Chairman.

SENATOR HAYDEN: And ARB, thank you very, very much.

MR. FRANK: If I may, with whom should I leave these briefs that I've brought over?

SENATOR HAYDEN: I've got one. Why don't you give them to the Senate Members.

This is the brief in the Methanex case?

MR. FRANK: No, I'm sorry, the earlier court decisions that I mentioned: the brief we filed in the Burma case and the other two: Holocaust and slave labor litigation.

SENATOR HAYDEN: We'll take them and any Member that wants a copy we'll make copies.

MR. FRANK: Thank you very much.

SENATOR HAYDEN: Thank you.

Mr. Jennings, Mr. Kenny. Good evening.

MR. MICHAEL KENNY: Good evening.

SENATOR HAYDEN: Any comments on the foregoing?

We have a number of questions, but jump right in.

MR. KENNY: I think we're prepared to answer any questions the Senator and his colleagues may have.

SENATOR HAYDEN: Is the ARB involved in this MTBE case?

MR. KENNY: Actually, let me introduce myself real quickly. My name is Mike Kenny. I'm the Executive Officer for the Air Resources Board. And to my right is the Senior Staff Counsel for the Air Resources Board, Mr. Tom Jennings.

The answer is that we are not formally involved but we are participating informally, and Mr. Jennings can answer a number of questions on that.

MR. TOM JENNINGS: Yes, we have been working closely with Susan Durbin, with Cal-EPA, with the Water Board, and particularly with the State Department to give them feedback, set up contacts with them. I was quite impressed that they actually came out, met with our staff, went down to Santa Monica and met with the City of Santa Monica people to get a better sense of the MTBE problems. And they actually have provided us with copies of every draft of their statement of defense to get our suggestions, and I think they very seriously considered them.

SENATOR HAYDEN: Yeah, I have no reason to doubt that, but you're saying in this case, the interests of the federal government and the state government and the City of Santa Monica coincide and there's a lot of cooperation.

MR. JENNINGS: I think that's fair to say.

SENATOR HAYDEN: Although it's not formally required.

MR. JENNINGS: Yes.

SENATOR HAYDEN: Now, what if there was a difference of interest between the federal government and the State of California and there's no formal requirements?

Then--?

MR. JENNINGS: Well, that's a real good question and I don't pretend to know the answer.

SENATOR HAYDEN: Well, they'd probably consult you less extensively, right?

SENATOR MOUNTJOY: Probably not even call.

SENATOR HAYDEN: Make fewer visits to bolster their case, wouldn't you think?

MR. JENNINGS: Yes.

SENATOR HAYDEN: They'd be working with the other side to weaken your case.

MR. JENNINGS: Well, hopefully they wouldn't be working with a representative from the other country, but I can't really predict how they would handle things.

SENATOR HAYDEN: Well, in the Holocaust issues and the World War II issues, they're working with our NATO partners. They're sending letters to state and federal court saying, *We've gone far enough with this in the interest of diplomacy*, and so on; *We don't think that these people should have standing*. So the United States government is cooperating with German government and business against California residents.

MR. JENNINGS: I think the one difference there is that on the Holocaust situation, they may perceive that they have a strong national interest in maintaining a national approach to foreign relations; whereas, I believe they share our interest in adopting sound and legitimate environmental regulations protecting the people of the State of California.

MR. KENNY: Senator, if I could add, I think your premise is correct. If, in fact, the interests were not aligned, the lack of a formal role by the State of California would probably have an impact on the outcome.

SENATOR HAYDEN: And we've seen that in a nonenvironmental issue, the Burma case, where the business community was joined by the Clinton Administration against Massachusetts and California, and that _____ was negligible there.

But are there any such issues that you see on the horizon that would affect our environmental laws? The Georgetown University people say there's a number.

MR. JENNINGS: Well, I looked at what they had identified. Obviously, they identified the MTBE situation, and I share the view of Susan Durbin. I certainly think that it would be extremely troubling if the federal government were to lose that case, but I share her belief that there's--

SENATOR HAYDEN: That we won't lose that case.

MR. JENNINGS: That we certainly should not lose that case. And I might mention that the arbitrator appointed by the State Department was Warren Christopher. I think that was the person that had been recommended by our people, and it certainly shows the seriousness with which the State Department is approaching this.

SENATOR HAYDEN: Any other air quality issues? I'm looking for them here. I'm slowing down.

MR. JENNINGS: I think the other thing he mentioned in particular was our motor vehicle emission control standards. Obviously, those have to be complied with both by domestic companies and foreign companies. We apply them in a totally nondiscriminatory way in which we treat both kinds of motor vehicle manufacturers exactly the same. In my 20 years working at the ARB, we've never had a complaint that our motor vehicle program causes a trade problem; although it certainly could be raised in the future.

SENATOR HAYDEN: Clean air standards?

MR. JENNINGS: The clean air standards? I personally think the clean air standards are where we'd probably be the strongest, setting ambient air quality standards. I mean, gee, if they held that the California ambient air quality standards were a violation of NAFTA, I guess they'd have to find the federal--

SENATOR HAYDEN: Well no, as I understand it, they let the dirtier Venezuelan crude into the country over the objection of the northeastern states, which sent them into a tailspin in terms of reaching nonattainment levels. It didn't affect the California market for reasons having to do with California and Venezuela. But we already lost that. We had testimony from Mary Nichols last week, and when she was back there in Washington. We had to let the dirtier crude in.

MR. JENNINGS: We carefully watched that Venezuelan crude case because we thought it could have an adverse impact on us. However, the issue there was that EPA adopted reformulated gasoline regulations that provided an option to domestic refiners for how they would set their baseline of the quality of 1990 gasoline, and they didn't provide that same option to foreign refiners. And it was on that basis that Venezuelan companies and Brazilian companies challenged it, and our regulations don't make that kind of distinction.

I mean, in my view, that was the sort of thing where, if there was not a legitimate basis for treating them differently, it could be appropriately challenged.

SENATOR HAYDEN: It could be.

What about the subsidies or incentives for low emission or zero emission vehicles? Couldn't a foreign car manufacturer say that's discriminatory against our opportunity to sell in California?

MR. JENNINGS: Well, to the extent that we have subsidies, or I know the City of Vacaville has subsidies for zero emission vehicles. I think they subsidize any zero emission vehicle whether it's produced in the United States or outside the United States.

My sense of, and I'm not at all an expert particularly outside the air pollution field, but my sense is that the kind of state actions or local actions that may be most problematical are the ones that actually do try to encourage California based businesses by giving them preferences over other businesses. But we personally don't administer programs like that.

SENATOR HAYDEN: Right, and we're coming to those. But you mean like procurement to favors, hiring Californians or California based businesses.

MR. JENNINGS: That's correct.

SENATOR HAYDEN: But don't we also have all kinds of regulations that would affect your agency on motor fuels or sources of air pollution? Aren't those theoretically subject to challenge as well?

MR. JENNINGS: Well, I mean, they're subject to the same kind of challenge that Methanex is raising.

I wanted to mention a couple of things, if it's okay, about our motor vehicle regulations. I wanted to first make sure you were aware that we have finally finished the rulemaking process on the Phase 3 gasoline regulations that

formally phase out MTBE. Those were approved by the Office of Administrative Law on August 2nd and become operative September -- I think August 3rd, and September 2nd they become operative. So that's when we finally have a legally enforceable requirement that you can't have MTBE in California gasoline after December 31, 2002.

SENATOR MOUNTJOY: What is the replacement oxygenate?

MR. JENNINGS: Well--

SENATOR MOUNTJOY: That means we haven't got a waiver yet from the federal government. I assume we have an oxygenate in it.

MR. JENNINGS: That's correct. Mike, who has been intimately involved in that, can fill you in more. But right now, under our regulations, the only other oxygenate companies could use is ethanol.

SENATOR MOUNTJOY: Is it a high percentage?

MR. KENNY: It is still 2 percent, Senator; 2 percent minimum.

MR. JENNINGS: I lost my train of thought.

SENATOR HAYDEN: No. We'll go back over this and communicate with you through letter to clarify this.

Let me ask you, though, to do a sum review of the various regulations that you have on motor fuel, sources of pollution, asbestos, detergents, hazardous materials. If they don't have a comparable international standard, then they have to meet WTO or NAFTA requirements and they could be challenged, I think, down the road. Or, there could be a claim that they weren't science based. Science based means in the most extreme sense of science, so

you couldn't say we're using the precautionary principle: We think it's better safe than sorry. They could be challenged that way.

And the other one that we'd like you to get back to us on is whether you've intervened or had any attention to this Mexican trucking issue. I forget the numbers. We mentioned them last time, but as a result of NAFTA, there's been this huge surge. I'm told the number of trucks crossing the border has doubled. The pollution impacts at the border, the lead, the impacts of air pollution from vehicular traffic including trucks, is a very important issue, but I take it that you haven't been any more involved than the previous agency witnesses in this case. Or have you?

MR. JENNINGS: I'm not the general counsel. I'm just one of the staff counsel who works there.

SENATOR HAYDEN: Right. Do you know if the ARB is involved in that issue?

MR. KENNY: I don't believe we are.

SENATOR HAYDEN: All right, thank you.

Any other questions?

All right, thank you very much.

I'd like to continue the dialogue. Is a Caltrans representative here? This will be very brief, Members. We are fishing here to find out how many state agencies' jurisdiction is touched by these agreements, and the good people at Caltrans say there's kind of a small area of their work.

Do you want to just please identify yourself?

MR. BRUCE BEHRENS: Good afternoon, Chairman and members of the committee. I'm Bruce Behrens from Caltrans' Legislative Affairs staff.

I had an opportunity just this afternoon while I was in the audience to thumb through the report by Mr. Collier, and identified a couple of points that were raised regarding trucks. And really, those are the only points that we have to speak to.

One is the question of really where we are in terms of implementation. We, in 1995, began preparing for the influx of border traffic and began to construct two border facilities at Otay Mesa and Calexico. These were about \$27 million of investment and basically provided a means to provide access, improved access, across the border. These were one-stop shops that we built. It has DMV, Highway Patrol, Air Resources Board, Board of Equalization, and the courts. They've been in operation since 1996, and during this time, we've seen truck traffic increase from approximately 670,000 a year to a little over 1.2 million.

SENATOR HAYDEN: What page of the Collier report is that?

MR. BEHRENS: I was looking at page 60.

These facilities continue to work well. In 1996, the opening year, about 30 percent of the trucks that were entering those facilities were put out of service, and by that I mean that problems were identified with their equipment or their operations. In 1999, that number of out-of-service trucks had dropped to 25 percent, and this drop occurred while a significant increase in volumes was occurring at that same time.

In 1998, the Office of the Inspector General conducted a study and found that California had the best record, at least at that time, in terms of inspections at the border. While the California out-of-service rate was about 25 percent, there were areas in Texas where that rate was 75 percent out of compliance.

It's important to realize that what that means is that they come in, we find about 25 percent of them out of compliance, but before they leave those stations, and they've been inspected, they're in a hundred percent compliance at this time with the safety requirements. And those are primarily done by the Patrol, by the CHP.

These facilities have served as models for the other border states. In fact, Texas and Arizona have borrowed our plans and they're constructing similar facilities to try and facilitate the truck traffic at their borders.

SENATOR MOUNTJOY: Do you actually fix the trucks to bring them up to compliance? How does that work?

MR. BEHRENS: I wish I had a representative from the CHP here to answer that question. Caltrans is not actively involved in those repairs. I can't speak to that.

SENATOR MOUNTJOY: I'm curious how they bring them into compliance. If they do the same as they do U.S. trucks -- I mean, it could be a broken shackle on a spring. It could be a series of things. I'm just curious how they bring them into compliance.

MR. BEHRENS: I can try and get that information for you, Senator. I don't have it today.

SENATOR MOUNTJOY: But they don't impound the truck. They just simply repair it and bring it into compliance?

MR. BEHRENS: As I understand it, they are brought into compliance if they want to enter, if they want to pass through.

A second issue that I think is addressed also in the Collier report is a little bit later, and I think perhaps Caltrans' involvement is appropriately recognized, that we're in Appendix D. Actually, not Caltrans, but we're a somewhat secondary participant in this.

SENATOR HAYDEN: What page?

MR. BEHRENS: This is page 72, which is a discussion of the border infrastructure needs. And this is actually, probably, where we're most directly involved.

There's a couple of projects that were identified in the report that were objects of concern: Alameda Corridor as well as improvements to State Route 905 and State Route 7. Those are projects that had been included in the Governor's Transportation Plan. They're among the projects that we are proposing to improve.

SENATOR HAYDEN: I don't think that's a NAFTA or WTO issue, is it?

MR. BEHRENS: I think that's as close as we get, I guess is what I'm suggesting.

SENATOR HAYDEN: Well, what about this thing -- last question -- that's called the California Transportation Research and Innovation Program? Does that still exist?

MR. BEHRENS: I do not know. That's not something that we've participated in that I'm aware of.

SENATOR HAYDEN: It was in your agency, and the Georgetown study flagged it because it provides some subsidies to California companies to help them get an advantage in the global marketplace. You might--

MR. BEHRENS: I'd be happy to take that back and try and get some information for you.

SENATOR HAYDEN: All right. It's a research and innovation program that I think we put some money into. But it's a real example of the state subsidizing a company to get an edge in the market, and somebody out there may notice it and--

MR. BEHRENS: Take advantage of it?

SENATOR HAYDEN: No, challenge. They may say, *Oh, you can't do this.*

All right. I don't know if there's any other questions on this, but thank you for trying to see where Caltrans fits under this picture, if any place. I think the issues you're talking about are important issues but I'm not sure they would be affected by these trade agreements. Although, who knows? They may say the Alameda Corridor is an unfair trade advantage.

SENATOR MOUNTJOY: The Alameda Corridor...[cross talking]...shipping from other countries.

SENATOR HAYDEN: That's right. They could say it's an unfair trade advantage.

All right, thank you very much.

Any other questions from Members? If not, we'll get the transcript back to you.

We may try to do one more informational probe next week if anybody has an agency in mind. I've been trying to get the Treasurer's Office and having some difficulty. They throw California interests around extensively in the world marketplace, and I can't imagine that they're going to be free of motives(?).

UNIDENTIFIED: I think you're right.

SENATOR HAYDEN: Thank you very much.

That concludes the hearing.

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